Filed 9/28/09 Smedberg v. Toste CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

DARIN P. SMEDBERG et al., Plaintiffs and Respondents, v. GERALD D. TOSTE et al., Defendants and Appellants.	C058031 (Super. Ct. No. PC20060340)

Once again a dispute over a driveway and access to neighboring property spawns ongoing litigation. Defendant Gerald D. Toste blocked the use of a driveway with a fence and various other obstructions. Plaintiffs Darin P. Smedberg, Teresa Rowan, Kenneth Smedberg, and Bonnie Smedberg sued Toste and his wife, Robin Toste, to quiet title.[1] The trial court granted a preliminary injunction in plaintiffs' favor and later

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[1] When referring herein to all four plaintiffs collectively, we use the term "plaintiffs." Darin Smedberg and Teresa Rowan are referred to collectively as the "Smedberg/Rowans." When necessary for clarity, we refer to individuals by their first names.

found Gerald in contempt. Plaintiffs filed a memorandum of costs, which the trial court awarded in full. The Tostes appeal, contending costs were improperly awarded. Plaintiffs have filed a motion to dismiss and a request for sanctions. We shall affirm the judgment. We deny plaintiffs' motion to dismiss, but order sanctions against the Tostes and their counsel in the amount of attorney fees incurred by plaintiffs in defending this appeal. We also find sanctions in the amount of $2,500 shall be paid by the Tostes and their counsel to the clerk of this court to defray the costs of processing this appeal.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In 1977 Kenneth and Bonnie purchased a piece of property that was divided into five parcels. They hold the property in a revocable living trust for which they are the trustees.

Access to the east portion of the property from the west portion is made difficult by a creek that bisects the property. Kenneth and Bonnie's residence and driveway are on the west side of the creek. Kenneth and Bonnie deeded a parcel on the east side of the creek to their son Darin, who then deeded an interest to his girlfriend, Teresa.

In order to provide access to the eastern parcels, two contiguous easements were created near the southeast portion of Kenneth and Bonnie's property. These easements were in

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[2] The facts are taken from our opinion in an earlier appeal. (*Smedberg v. Toste* (Dec. 10, 2008, C056578) [nonpub. opn.].)

existence when Kenneth and Bonnie bought the property in 1977 and are sometimes referred to as the north easement and the south easement. The south easement runs along the northeast boundary of the Tostes' property. The north easement runs the length of the southwest boundary of two parcels contiguous to the Tostes' property, one of which is owned by plaintiffs Hugo Giusti and his son Ronald Giusti.

In 2003 the Smedberg/Rowans began planning to build a home on their parcel. Since their parcel was to the east of the creek, they needed to use the easements to access their house. The Smedberg/Rowans told the Tostes about their idea to build a house and the need for a driveway on the easements; the Tostes did not object.

The following year, Gerald built a fence between the boundaries of the two easements, telling Kenneth and Darin Smedberg he had erected the fence as a temporary measure to keep his dogs in his yard. According to Gerald, he would remove the fence if it became a problem.

In May 2006, when the Smedberg/Rowans began construction of the driveway on the easements, Gerald told Kenneth, Bonnie, and Darin Smedberg they were "ruining the neighborhood" and that he had just written a $10,000 check for legal representation to stop the house construction. Gerald began piling obstructions along the easements. Gerald used his truck to block tree cutters hired by the Smedberg/Rowans. He also posted signs on the trees stating they had been spiked with nails.

The Tostes' dogs scared off the Smedberg/Rowans' contractors, and Gerald warned grading contractors not to trespass on the easements. Gerald removed erosion control devices on the easements. When Bonnie and Teresa walked on the easements, Gerald chased and photographed them. Gerald's actions led the Smedberg/Rowans to halt construction of the driveway.

In July of 2006 plaintiffs filed a complaint to quiet title, to obtain declaratory relief, and to obtain an injunction and damages for nuisance. They also obtained a preliminary injunction to stop the Tostes from blocking access to the easements and to compel removal of the fence and other obstructions. The Tostes cross-complained, alleging plaintiffs, as well as cross-defendants Hugo Giusti and Ronald Giusti, adversely possessed the south easement and a portion of the north easement on the Giustis' parcel.

In November 2006 plaintiffs filed a petition to hold the Tostes in contempt for violating the preliminary injunction. In April 2007, following oral argument and review of exhibits, the trial court found Gerald guilty of 12 counts of contempt for violating the preliminary injunction. The court sentenced Gerald to 60 days in jail but stayed execution of sentence for six months, although he was later remanded to the custody of the sheriff.

A jury trial followed in June 2007. The court rejected the Tostes' claim of adverse possession of the easements and found Gerald liable for nuisance. The court awarded plaintiffs

$65,000 in compensatory damages and $40,000 in punitive damages. The court granted the permanent injunction sought by plaintiffs, which enjoins the Tostes from "harassing, annoying, intimidating, interfering with and obstructing the plaintiffs and the plaintiffs' invitees in their improvement, maintenance and use of the easement."

The Tostes filed an appeal in this court. (*Smedberg v. Toste*, *supra*, C056578.) The Tostes' appeal presented a barrage of allegations, some of which they renew in the current matter. We affirmed the trial court's judgment in our opinion filed December 10, 2008. (*Ibid*.) We also awarded plaintiffs and the Giustis costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

The Tostes filed the present appeal on January 22, 2009. On January 22, 2009, plaintiffs filed a motion to dismiss the Tostes' appeal and a request for sanctions against the Tostes and the Tostes' counsel.

DISCUSSION

I

In the present appeal, the Tostes argue "certain costs were improperly awarded." However, the Tostes' contentions regarding the inappropriateness of the costs awarded merely regurgitate arguments made unsuccessfully in the previous appeal.

The Tostes assert the costs were improperly awarded because "[w]hen the complaint for quiet title was filed by Plaintiffs and when injunctive relief was requested, the Smedberg Trust was not a party plaintiff." Our previous opinion directly addressed this contention.

We stated: "The Tostes contend the Smedberg Trust was an indispensable party omitted by plaintiffs when they filed their complaint, and therefore all orders of the court and verdicts of the jury were void. The Tostes are wrong. [¶] 'Unlike a corporation, a trust is not a legal entity. Legal title to property owned by a trust is held by the trustee, and common law viewed the trustee as the owner of the trust's property.' [Citation.] A trust therefore does not have capacity to sue or be sued. [Citation.] Since the Smedbergs are the trustees of the property that they hold in a revocable living trust, they were the proper parties to maintain the lawsuit."

The Tostes also argue the injunction was overbroad, asserting that it was not an "exclusive easement" and that plaintiffs "had to accommodate Toste's use, not completely restrict it." Again, our previous opinion disposed of this argument.

We rejected the Tostes' contention that the injunction could not block all use by the Tostes, and that plaintiffs had to accommodate the Tostes' use. We concluded: "The language of the injunction belies these claims." We also determined that "[b]ased on the evidence presented at trial, the court was well within its discretion to grant the permanent injunction."

The Tostes attempt to dispute the resolution of these claims in our previous opinion, arguing: "The underlying appeal in Appeal No. C056578 has not yet been determined to be final because Toste filed a timely petition for review with the Supreme Court, which is pending and for which judicial notice is

requested." Regardless of whether a petition for review has been filed, the arguments set forth by the Tostes in this appeal are duplicative of arguments settled by our previous opinion and a waste of judicial resources. In any event, the Supreme Court denied the Tostes' petition for review on February 18, 2009. (*Smedberg v. Toste*, S169760, Feb. 18, 2009 [order].)

Nor does the fact that the Tostes appeal from the order for costs change our analysis. The Tostes are appealing from a different order but recycling the same arguments we previously considered. The order for costs is merely another vehicle for the Tostes to advance arguments already rejected by this court.

II

When it appears that an appeal is frivolous or taken solely for delay, we may add to the costs on appeal such damages as may be just. (Code Civ. Proc., § 907; Cal. Rules of Ct., rule 8.276; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 646.) We may impose sanctions on the offending attorney, offending party, or both. (Cal. Rules of Court, rule 8.276(a).)

The standard for determining whether an appeal is frivolous was set forth by the Supreme Court in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637 (*Marriage of Flaherty*).[3] The court

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[3] The standards are enshrined in Code of Civil Procedure section 907: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." So also, California Rules of Court, rule 8.276 provides: "[A] Court of Appeal may impose sanctions, including the award or denial of costs under [California Rules of Court,] rule 8.278, on a party

described two standards, a subjective standard and an objective standard. "The subjective standard looks to the motives of the appellant and his or her counsel. . . . [¶] The objective standard looks at the merits of the appeal from a reasonable person's perspective. 'The problem involved in determining whether the appeal is or is not frivolous is not whether [the attorney] acted in the honest belief he had grounds for appeal, but whether any reasonable person would agree that the point is totally and completely devoid of merit, and, therefore, frivolous.' [Citations.] [¶] The two standards are often used together, with one providing evidence of the other. Thus, the total lack of merit of an appeal is viewed as evidence that appellant must have intended it only for delay. [Citation.] [¶] Both strands of this definition are relevant to the determination that an appeal is frivolous. An appeal taken for an improper motive represents a time-consuming and disruptive use of the judicial process. Similarly, an appeal taken despite the fact that no reasonable attorney could have thought it meritorious ties up judicial resources and diverts attention from the already burdensome volume of work at the appellate courts. Thus, an appeal should be held to be frivolous only when it is prosecuted for an improper motive -- to harass the respondent or delay the effect of an adverse judgment -- or when it indisputably has no merit -- when any reasonable attorney

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or an attorney for: [¶] (1) Taking a frivolous appeal or appealing solely to cause delay . . . ."

would agree that the appeal is totally and completely without merit. [Citation.]" (*Id.* at pp. 649-650.)

Measured by this standard, there is no doubt that this appeal filed by the Tostes is frivolous. Under the guise of challenging the cost order, the Tostes raise two issues considered and disposed of in our previous appeal. The Tostes have maintained this appeal notwithstanding the issuance of our previous opinion and in the face of plaintiffs' request for dismissal.

We acknowledge that "Counsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal. An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions." (*Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 650.) However, no reasonable attorney could have thought that the Tostes' recycled versions of previously rejected appellate arguments could possibly succeed. Much as we might admire perseverance and struggle against the odds, there is nothing noble about subjecting parties and this court to the unnecessary labor and expense of a duplicative appeal.[4]

There remains the question of the amount of sanctions and who should pay -- the attorney, the client, or both. Sanctions for filing a frivolous appeal are intended to compensate for

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[4] We grant plaintiffs' August 29, 2008, and January 22, 2009, requests for judicial notice of documents including our earlier unpublished opinion in *Smedberg v. Toste* (Dec. 10, 2008, C056578) and records of the trial court related to that appeal.

expenses occasioned by the appeal and to deter similar conduct in the future. (*Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 647.) The amount of attorney fees reasonably incurred in responding to a frivolous appeal is one appropriate measure of sanctions. (See *In re Marriage of Economou* (1990) 223 Cal.App.3d 97, 108.) However, we are not limited to compensation for expenses but "may also require the payment of sums sufficient to discourage future frivolous litigation." (*People ex rel. Dept. of Transportation v. Outdoor Media Group* (1993) 13 Cal.App.4th 1067, 1082; see also *Marriage of Economou*, *supra*, 223 Cal.App.3d at pp. 107-108.) In addition to compensating the respondent for costs and expenses, the amount of sanctions should also take into account the costs imposed on the court system by the waste of time and resources in processing, reviewing, and deciding a frivolous appeal. The amount of this cost has been variously estimated. "A recent conservative estimate of the cost to the state of processing an average civil appeal is $6,000." (*Keitel v. Heubel* (2002) 103 Cal.App.4th 324, 343.) The cost of processing the present appeal was less than usual given that the issues were resolved in an earlier appeal and the record is relatively small.

Responsibility for a frivolous appeal is shared by the attorney as well as the client. The client may be the instigating force. However, "An attorney in a civil case is not a hired gun required to carry out every direction given by the client. (Bus. & Prof. Code, § 6068, subd. (c).) As a professional, counsel has a professional responsibility not to

pursue an appeal that is frivolous or taken for the purpose of delay, just because the client instructs him or her to do so. (Rule 2-110(C), Rules Prof. Conduct.) Under such circumstances, the high ethical and professional standards of a member of the bar and an officer of the court require the attorney . . . to withdraw from the representation of the client." (*Cosenza v. Kramer* (1984) 152 Cal.App.3d 1100, 1103.) Where, as here, the client and the attorney are both responsible for pursuit of a frivolous appeal, it is appropriate that liability for sanctions be shared jointly and severally.

Prior to oral argument the court provided written notice to counsel that we were considering an award of sanctions. Both counsel and the Tostes were ordered to appear at oral argument. Thereafter, plaintiffs' counsel submitted a declaration in which he calculated his total fees for working on this appeal to be $9,875. He requests that we impose that amount, "plus at a minimum treble the amount of these fees," as sanctions against the Tostes and their attorney, jointly and severally, to compensate plaintiffs and to discourage further frivolous appeals. The Tostes' counsel, Charles Kinney, submitted a counterdeclaration in which he asserts the Tostes have few assets and expresses incredulity at the amount claimed as fees by plaintiffs' counsel.[5]

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[5] We requested plaintiffs' counsel to submit a declaration detailing the amount of his fees in connection with the present appeal. We later permitted the Tostes' counsel to respond. Both declarations contain argument and averments beyond the

We find that the Tostes' frivolous appeal caused plaintiffs to reasonably incur $9,875 in attorney fees. That amount is assessed as sanctions against Gerald G. Toste and Robin Toste, and their attorney, Charles G. Kinney, jointly and severally.

Further, in light of the undue burden this appeal has placed on the legal system and the consumption of this court's time, sanctions in the amount of $2,500 are assessed against Gerald G. Toste and Robin Toste, and their attorney, Charles G. Kinney, jointly and severally.

DISPOSITION

The judgment is affirmed.

We find this appeal to be frivolous and assess sanctions against the Tostes and their attorney, Charles G. Kinney, jointly and severally, as follows:

Sanctions in the amount of $9,875, payable to plaintiffs, within 30 days of the issuance of the remittitur in this matter.

Sanctions in the amount of $2,500, for the cost of processing the appeal, which sum shall be paid to the clerk of this court within 30 days of the issuance of the remittitur in this matter.

In addition to the award of sanctions, plaintiffs are entitled to costs on appeal.

This opinion constitutes a written statement of our reasons for imposing sanctions as required by *Marriage of Flaherty*,

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ambit of the original request. We have considered only those portions of the declarations bearing on the amount of fees reasonably incurred by plaintiffs in addressing this appeal.

supra, 31 Cal.3d 637, 654. Pursuant to the requirements of Business and Professions Code section 6086.7, subdivision (c), a copy of this opinion shall be forwarded to the State Bar of California.

RAYE, J.

We concur:

SCOTLAND, P. J.

SIMS, J.